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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 542

E. W. WIGGINS AIRWAYS, INC.,
PETITIONER,

v.

MASSACHUSETTS PORT AUTHORITY,
BUTLER AVIATION — BOSTON, INC.,
and BUTLER COMPANY,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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MASSACHUSETTS PORT AUTHORITY,
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and BUTLER COMPANY,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on June 15, 1966.

Citations to Opinions Below

The memorandum opinion of the United States District Court for the District of Massachusetts is unreported and

is printed in the Record Appendix, p. 46.[1] The opinion of the Court of Appeals for the First Circuit, printed in Appendix A hereto, infra, pp. 1a-8a, is reported in 362 F.2d 52 (1966).

Jurisdiction

The judgment of the Court of Appeals was entered on June 15, 1966. Appendix A hereto, infra, p. 8a. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether the antitrust laws apply to the actions of a state-created port authority which is not subject to supervision by the state.
2. Whether the facts alleged make out a case of conspiracy under the antitrust laws.
3. The petitioner raises the points (a) that the Authority is acting in a proprietary capacity and (b) that immunity from suit, if any, enjoyed by the Authority does not apply to the co-respondents under the particular circumstances of this case and intends to urge them if certiorari be granted.

Statutes Involved

The Federal Antitrust Statutes involved are Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. §§ 1,

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[1] The petitioner's record appendix filed in the Court of Appeals is referred to herein as R. followed by the appropriate page number. The record appendix of respondents, Butler Aviation—Boston, Inc. and Butler Company and the petitioner's supplemental record appendix are not referred to herein as they concern only questions of limitations and venue not considered by the Court below.

2 as amended and Sections 4 and 16 of the Clayton Act, 38 Stat. 730, 15 U.S.C. §§ 15 and 26, as amended, the pertinent parts of which are set forth in footnotes to the opinion of the Court of Appeals in Appendix A hereto, infra, pp. 1a, 2a.

The Massachusetts statute involved is an enabling act creating the respondent, Massachusetts Port Authority, Chapter 465 of the Acts of 1956, as amended. In 1956 the Supreme Judicial Court of Massachusetts submitted an opinion to the Senate (Massachusetts) on the then pending bill creating the Massachusetts Port Authority. *Opinion of the Justices,* 334 Mass. 731 (1965), 136 N.E. 2d 223. The thirty closely printed pages of the bill were summarized by that Court. That summary is set forth in Appendix B hereto, infra, pp. 9a-13a, and contains that which is pertinent to the issues here presented. Relevant excerpts from that opinion are also printed following the summary. (Appendix B, hereto, infra, pp. 13a-15a)

Pertinent parts of the Federal Aviation Agency Policy Statement on Exclusive Rights at Airports, Federal Register, Vol. 30, 208, October 27, 1965, including Pertinent Parts of Section 308 (a) of the Federal Aviation Act of 1958, as amended, 72 Stat. 750, 49 U.S.C. 1349 are set forth in Appendix C hereto, infra, pp. 16a-17a.

Statement of the Case

This litigation involves the attempted monopolization of privately owned and operated businesses called "fixed base operations" at Logan Airport in Boston, Massachusetts.

> "A fixed base operation is one that provides facilities, fuel, equipment, supplies and services at an airport which are used by aircraft, crews, passengers and in-

handling freight connected therewith. *It is vital to air transportation''*. (Emphasis supplied). Opinion of Court of Appeals Appendix A, hereto infra, p. 2a, footnote 2.

The petitioner's business at Logan was totally destroyed as a result of the acts of which it complains.

The petitioner brought the action in the United States District Court for the District of Massachusetts under the antitrust laws in which the petitioner alleged that the respondents violated §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). The complaint as amended sought threefold damages, costs and attorney's fees pursuant to § 4 of the Clayton Act (15 U.S.C. § 15) and injunctive relief pursuant to § 16 of the Clayton Act (15 U.S.C. § 26). Jurisdiction is founded on these latter two statutes and 28 U.S.C. § 1337.

The petitioner, E. W. Wiggins Airways, Inc., a Massachusetts corporation, brought its original complaint on March 8, 1963, against the respondent Massachusetts Port Authority (Authority) and the respondent Butler Aviation - Boston, Inc. (Butler-Boston), an Illinois corporation (Docket, R. 1) (R. 5). The petitioner moved to add the respondent Butler Company d/b/a Butler Aviation, also an Illinois corporation, (Butler) as a defendant which was allowed on April 12, 1965.

A hearing was held on respondents' motions to dismiss on December 20, 1965. (Docket, R. 4). The District Court entered a Memorandum of Decision on Defendants' Motions to Dismiss on December 28, 1965 and a Judgment of Dismissal on January 5, 1966 (R. 46). From this Judgment of Dismissal the petitioner appealed (R. 47).

On June 15, 1966 the Court of Appeals affirmed the dismissal of the amended complaint by the District Court. (Appendix A, hereto, infra, p. 1a).

The amended complaint[2] includes the following allegations: At an airport a "fixed base operation" is a business servicing commercial and private flying and is engaged in interstate commerce (R. 7). The relevant market is confined to the geographic boundaries of Logan Airport (R. 9). For many years the petitioner and others had competed at Logan Airport as fixed base operators in a safe and efficient manner (R. 8). The respondent Authority took over ownership and control of Logan in 1959 (R. 7). Petitioner and its principal competitor Van Dusen Aircraft Supplies of New England, Inc. (Van Dusen) for years had conducted their competing fixed base operations in adjacent hangars at Logan under successive leases from the Authority's predecessors in title (R. 8). Petitioner's lease expired December 1959 and Van Dusen's was to expire on December 1961 (R. 8). In late 1959 petitioner sought a new lease or a tenancy at will pending efforts to get more suitable facilities on Logan (R. 9). The Authority permitted petitioner to remain at its then location only as a tenant-at-will on a month to month basis (R. 9). In early 1960 the Authority and the respondent Butler entered into a conspiracy whereby the Authority would refuse new leases to petitioner and Van Dusen and would exclude them from Logan and Butler would take over the petitioner's and Van Dusen's businesses and become the sole and exclusive fixed base operator (R. 10). Butler was an Illinois corporation which had never done business at Logan and was not authorized to do business in Massachusetts (R. 10). The Authority as owner of Logan was in a position to and did control or affect competition between the fixed based operators (R. 11). After soliciting proposals from various fixed base operators regarding the leasing of properties at Logan for fixed base opera-

[2] Hereinafter called complaint.

tions, the Authority in early 1961 in accordance with the conspiracy selected Butler to be the sole and exclusive fixed base operator at Logan to take over petitioner's and Van Dusen's businesses (R. 12). Pursuant to the conspiracy petitioner was forced out of Logan by the Authority in mid-April 1961; was forced to sell to Butler its equipment at Logan for what it could get; and was forced to turn over its hangar, employees and business at Logan to Butler (R. 12). Petitioner and Van Dusen appealed to the Federal Aviation Authority (F.A.A.) in March 1961 (R. 13). In May 1961 the respondent Butler-Boston was incorporated in Illinois and in early June registered to do business in Massachusetts (R. 13). It was formed to carry out the plan and agreement entered into by the Authority and Butler (R. 13). In September 1961 a lease retroactive to July 1, 1961 between the Authority and Butler-Boston was executed the effect of which was that Butler-Boston would take over the facilities of petitioner and Van Dusen and become the sole and exclusive fixed base operator at Logan (R. 14). In February 1962 the F.A.A. ruled that the substitution of a single fixed base operator was in conflict with the Federal Aviation Act and instructed the Authority to permit Van Dusen to stay on at Logan and to take steps to negotiate with all interested parties to correct the situation then existing at Logan (R. 14). Thereafter, efforts were made by petitioner to return to Logan but the Authority as late as September 1962 refused to permit fueling privileges to petitioner (R. 14, 15). As fueling is a major and essential part of a fixed base operation, petitioner's return to Logan under this restriction would be economically unsound (R. 15). Petitioner, thereby, was denied entrance to Logan by the Authority (R. 15). The exercise by the Authority of its power to exclude competition at Logan was not justified by reasonable business requirements and was arbitrary,

capricious and unreasonable and in bad faith (R. 15). Petitioner was not only damaged by the loss of its business at Logan but suffered consequential damages to its remaining fixed base operation business at Norwood Airport (Norwood, Massachusetts) which had been operated by petitioner in a manner complementary to that at Logan (R. 15). Only the intervention of the F.A.A. prevented the respondents from fully carrying out their conspiracy to monopolize the fixed base operations at Logan but the F.A.A. intervention came too late to save petitioner (R. 16).

The Court of Appeals affirmed the dismissal of the complaint by the District Court apparently on the following reasoning:

> 1. The Authority was exercising a valid governmental function as an instrumentality or agency of the state pursuant to the legislative mandate imposed upon it to operate and manage the airport and establish rules and regulations for its use and was not acting in a proprietory capacity;
>
> 2. The antitrust laws are aimed at private action, not governmental action. The fact that the statute creating the Authority empowered it to sue and be sued in its own name does not permit a private antitrust suit because Congress never intended to impose liability in the first place.
>
> 3. The facts alleged in the complaint do not make out a case of conspiracy. This was a simple agreement or arrangement with Butler to replace petitioner and Van Dusen with Butler and make Butler the sole and exclusive fixed base operator at Logan.
>
> 4. If the Authority's conduct was lawful then the other respondents' conduct was not unlawful.

Reasons for Granting the Writ

This case raises the important and novel question whether the rapidly growing commerce of civil aviation can be exposed to the grasp of the private monopolist without application of the antitrust laws merely because an airport is publicly owned. Nearly one-third of this country's airports are publicly owned.[3]

The remarkable growth at home and abroad of air traffic in both air carrier and general aviation has led to larger airports and to more and better facilities being made available at those airports. These airports' influence upon the economic growth of communities has encouraged local public ownership to exploit the great commercial potential presented by this local, national and international air traffic.

The desirability of public ownership of local airports, however, should not serve to thwart the fundamental national economic policy represented by the antitrust laws. See: *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 217 (1966). The importance of the problem is pointed up by the recent policy statement of the Federal Aviation Agency, Federal Register, Vol. 30, No. 208, p. 13661, October 27, 1965, generally prohibiting exclusive rights in the conduct of aeronautical activities at public airports on which Federal funds have been expended. (Appendix C, infra, p. 16a). In the policy statement, an aeronautical activity is defined as "Any activity which involves, makes possible, or is required for the operation of aircraft or which contributes to or is required for the safety of such operations." The activities classified therein as aeronautical activities are those activities usually conducted in the business of a fixed base operator.

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[3] See: FAA Statistical Handbook of Aviation, 1965 Edition, Federal Aviation Agency, pp. 5 and 6.

(Complaint, par. 8, R. 7; Opinion of Court below, Appendix A hereto, infra, p. 2a; F.A.A. Policy Statement, Section 5(b) (Appendix C hereto, infra, p. 17a).

Interestingly, ground transportation (taxis, car rentals, limousines); restaurants; barber shops; and auto parking lots are not considered in the policy statement as aeronautical activities. (Appendix C hereto, infra, p. 17a).

In other words there are certain activities at an airport conducted by fixed base operators which are essential to air commerce and other activities as restaurants, barber shops, auto parking and ground transportation which, while desirable and useful mostly to passengers, are not essential to air commerce. The Court below failed to recognize the distinction as evidenced by its citing *Donovan* v. *Pennsylvania Company,* 199 U.S. 279 (1905) and *Parmelee Transportation Company* v. *Keeshin,* 292 F.2d 794 (7th Cir. 1961), cert. denied, 368 U.S. 944, rehearing denied, 368 U.S. 972 (1962), both involving exclusive taxi service rights at railroad stations.

Air traffic, whether commercial or private, must depend on fixed base operations at airports to sustain its operation. An exclusive fixed base operator at any airport is well positioned to extract his toll from the air traffic using that airport as well as from those outside the airport such as petroleum suppliers, airplane manufacturers, and parts distributors who desire to sell to those flying to and from that airport. The inherent evils of such an exclusive arrangement are legion.

The emergence of many public independent authorities across the nation and their effect on those engaged in various channels of commerce make it important for this Court to determine whether their actions are subject to the antitrust laws where their activities are not directed by the state creating them or where their conduct is arbitrary, capricious or unreasonable. To hold as the Court

below has done that such authorities may act without any supervision by the state creating them and without being subject to the antitrust laws leaves no guide lines for the protection of others engaged in commerce.

The novelty of the issue presented is evident from the fact that there appear to be no reported cases substantially indistinguishable from this case. Nevertheless, the issuance of the FAA policy statement indicates that the problems are fermenting generally and that the petitioner's injury is not an isolated event of only local concern.

The Court below has rejected the petitioner's claim on the basis that *Parker* v. *Brown,* 317 U.S. 341, 350-51 (1943), *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight Inc.,* 365 U.S. 127 (1961) and the other cases cited hold that the Sherman Act does not apply to the activities of a state or the activities of its officers directed by the state legislature. (Appendix A hereto, infra, pp. 6a, 7a). This holding is in direct conflict with that of *Harman* v. *Valley National Bank of America,* 339 F.2d 564, 566 (9th Cir. 1964) in which the Attorney General of Arizona was named in an antitrust case as a participating conspirator to place a financial institution in receivership. In discussing *Noerr* and *Parker* v. *Brown* the Court said: "Moreover, the complaint alleges that the acts of the Attorney General were those of a participating conspirator. In *Parker* v. *Brown,* 317 U.S. 341, 351, 63 S. Ct. 307, 314, 87 L. Ed. 315 (1943), the Court specifically reserved the question of the applicability of the Sherman Act to the case of 'a state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade', and *Noerr* does not hold that the Act would be inapplicable in such a situation." In the present case, the petitioner expressly alleges that the Authority was a participant in a private agreement with Butler and Butler-Boston for restraint of trade. Fur-

thermore, the enabling act and its interpretation by the state court expressly provides that the Authority "... shall not be subject to the supervision or regulation of the Department of Public Works or any other department, commission, board, bureau or agency of the commonwealth ..." (Appendix B hereto, infra, p. 9a). For these two reasons, the *Parker* v. *Brown* reasoning does not preclude the application of the antitrust laws to the activities of the Authority. The opinion of the Court below also appears to be in conflict in principle both with *Parker* v. *Brown* and with this Court's holding that "... (N)o state can endow any of its corporations, or any combination of its citizens with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress". *Northern Securities Co.* v. *United States,* 193 U. S. 197, 350. See: *United States* v. *California,* 297 U.S. 175, 184-185.

The Court below further held "... we do not reach any question of immunity, since there was no attempt on the part of Congress to impose liability in the first place". (Appendix A hereto, infra p. 7a). Congress certainly showed its intent to prohibit the grant of an exclusive right to conduct an aeronautical activity on an airport on which Federal funds have been expended. Section 308(a), Federal Aviation Act of 1958, as amended, 72 Stat. 750, 49 U.S.C. 1349 (pertinent part, Appendix C hereto, infra p. 16a, FAA Policy Statement Sec. 4) It was surely not the intent of Congress to preserve economic freedom on public airports receiving Federal grants and abandon it elsewhere.

The antitrust laws do not contain any statutory exemption for public authorities. Repeal of the antitrust laws by implication is not favored. *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357 (1962); *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 217 (1966).

Even a labor union having an express statutory exemption may become liable if it joins a conspiracy to eliminate competition, even though the union's part of the scheme is limited to wage matters. *United Mine Workers* v. *Pennington*, 381 U.S. 657, 663-665. *Allen Bradley Co.* v. *Union*, 325 U.S. 797.

Section 3 of the statute creating the Authority empowers it to sue and be sued in its own name. (Appendix B hereto, infra, p. 10a). In its advisory opinion, the Supreme Judicial Court of Massachusetts cited *Johnson-Foster Co.* v. *D'Amore Construction Co.*, 314 Mass. 416, 419 and compares the Authority's status to that of a housing authority. (Appendix B hereto, infra, p. 14a). In the *Johnson-Foster Co.* case the Court said of the housing authority, "It is an instrumentality of government, but it is also a corporation having the contracting powers of a corporation and suable as such in the same manner as a private corporation." (p. 419, supra). In *Costonis* v. *Medford Housing Authority*, 343 Mass. 108, 113, the Court said, "A housing authority has the contracting powers of a private corporation. . . . . It is 'liable in contract or in tort in the same manner as a private corporation'." A housing authority is not the agent or a department of the town creating it. *Clinton Housing Authority* v. *Finance Committee of Clinton*, 329 Mass. 495, 499. In *Commonwealth* v. *Biddescombe*, 347 Mass. 427, 429 (1964) the Court reaffirmed its description of the Port Authority by saying, "Moreover, Logan (St. 1956, c. 465, §5) is owned and operated by the Massachusetts Port Authority which is an entity in itself and has an existence apart and distinct from that of the Commonwealth."

The case of *Commonwealth* v. *Massachusetts Turnpike Authority*, 346 Mass. 250, clearly shows that an authority is not the alter ego of the Commonwealth. In that case the Commonwealth had to resort to the courts to declare

illegal and restrain certain takings of land by the Turnpike Authority from the Metropolitan District Commission, a department of the Commonwealth. There is almost verbatim similarity between the statutes creating and empowering the Turnpike Authority, St. 1952, c. 354, Sec. 3, par. 1, and the defendant Port Authority, St. 1956, c. 465, Sec. 2, par. 1.

Were the Turnpike Authority in fact and in law an arm of the Commonwealth, it seems unlikely that the Commonwealth would have to go to Court to prevent one of its "arms" from performing illegal acts.

In short, this is an action against the Massachusetts Port Authority—it is not an action against the Commonwealth of Massachusetts. See: *Gerr* v. *Emrich*, 283 F.2d 293 (3rd Cir. 1960), Cert. denied, 256 U.S. 817 (1961).

Thus, the state legislature and highest state court have not seen fit to impose any restrictions on the suability of the Authority. The Court below has arrived at its decision by repeal of the antitrust laws only by implication.

The Court below further ruled that a conspiracy was not sufficiently alleged in the complaint and said, "This was a simple agreement or arrangement. The fact that it was exclusive does not under these circumstances necessarily make it a conspiracy or make it illegal", (Appendix A hereto, infra pp. 7a, 8a.). The essence of an antitrust conspiracy is a combination or agreement to violate or to disregard the law. The complaint must be construed in the manner most favorable to the petitioner and there must be borne in mind the policy that, unless there is no doubt as to the result, cases should be disposed of upon their merits. There are no special rules of pleading in antitrust cases and Rule 8, F.R. Civ. P., is as applicable here as in any other case. The Courts should be liberal in construing antitrust complaints. Whether the charges be called allegations of fact or mere conclusions of the

pleader, they must be taken into account in deciding whether a claim for relief is stated. One purpose of Rule 8 was to get away from the highly technical distinction between statements of fact and conclusions of law, and other technicalities, that often made a party's success depend upon the skill of his counsel as a pleader rather than upon the merits of his case. The official forms and Rules 1 and 84, confirm this view. Most of the forms contain more "legal conclusions" than they do "facts". See: *Walker Distributing Co.* v. *Lucky Lager Brewing Co.*, 323 F.2d 1, 3-4 (1963); *Poller* v. *Columbia Broadcasting Co.*, 368 U.S. 464, 473 (1961); *Radiant Burners* v. *Peoples Gas Co.*, 364 U.S. 656, 660 (1960).

To state a claim upon which relief can be granted under Sections 1 and 2 of the Sherman Act, allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires. *Radiant Burners* v. *Peoples Gas Co.*, 364 U.S. 656, 660 (1960).

The complaint meets the above requirements because it shows: Healthy competition in "fixed based operations" in interstate commerce at the General Edward Lawrence Logan International Airport (Logan), the relevant market, had existed for years before the Authority took over. The area of effective competition is clearly confined to the geographic boundaries of Logan. Since the Authority owned and controlled Logan and the competing fixed base operators were dependent on leasing privileges to remain at Logan, the Authority had the power to control or affect competition in the market or business of conducting fixed based operations at Logan. The Authority and Butler Aviation conspired and agreed to monopolize that business. The Authority drove Wiggins out and turned its business over to Butler Aviation. Butler-Boston was there-

after created to carry out the conspirators' plan. The Authority in driving out Wiggins and attempting to drive out Van Dusen attempted to exercise unreasonably its monopoly power. Wiggins was damaged by the loss of its business at Logan and by the damage to its remaining business at Norwood.

The petitioner in support of its case relies on *Poller* v. *Columbia Broadcasting*, 368 U.S. 464 (1961) involving a cancellation of a television station affiliation and *Gamco, Inc.* v. *Providence Fruit & Produce Bldg.*, 194 F.2d 484 (1st Cir. 1952) cert. denied, 344 U.S. 817, involving the ousting of a tenant from a wholesale produce market. Under *Poller*, if the Authority's attempted replacement of the petitioner and its competitor Van Dusen by Butler and Butler-Boston was part of and parcel of unlawful conduct or agreement with Butler and Butler-Boston or was conceived in a purpose to unreasonably restrain trade, control a market, or monopolize, then such conduct might well run afoul of the Sherman Act. See: *Poller*, supra, p. 469.

Under *Gamco*, "the conjunction of power and motive to exclude with an exclusion not immediately and patently justified by reasonable business requirements establishes a *prima facie* case of the purpose to monopolize." (*Gamco*, supra, 488). The complaint alleges the conspiracy between Butler and the Authority to monopolize and that the exercise of its monopoly power by the Authority was not immediately and patently justified by reasonable business requirements, that its acts were arbitrary, capricious or unreasonable and that the same were done in bad faith. (R. 10, 11, 15). For the purposes of testing the complaint, the allegations must be taken as true. The respondents have the duty to come forward and justify Wiggins' ouster. *Gamco*, 488, supra.

Conclusion

For the foregoing reasons this petition should be granted.

Respectfully submitted,

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Appendix A

United States Court of Appeals
For the First Circuit

No. 6694.

E. W. WIGGINS AIRWAYS, INC.,
PLAINTIFF, APPELLANT,

v.

MASSACHUSETTS PORT AUTHORITY ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

Arthur H. Bloomberg, with whom *Grabill, Ley & Butterworth* was on brief, for appellant.

Warren F. Farr, with whom *Donald R. Grant* and *Ropes & Gray* were on brief, for Massachusetts Port Authority, appellee.

John M. Hall, with whom *Conrad W. Oberdorfer* and *Thayer Fremont-Smith* were on brief, for Butler Aviation-Boston, Inc., appellee.

John R. Halley for Butler Company, appellee.

OPINION OF THE COURT.

June 15, 1966.

McENTEE, *Circuit Judge.* This is a suit for alleged federal antitrust act violations brought by E. W. Wiggins Airways, Inc. under 15 U.S.C. §§ 15, 26 [1] against the Massa-

[1] 15 U.S.C. § 15 provides as follows:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

15 U.S.C. § 26 provides in pertinent part as follows:

chusetts Port Authority (the Authority), Butler Aviation-Boston, Inc. (Butler-Boston), and Butler Company (Butler). It involves fixed base operations, so-called,[2] at Logan Airport in Boston. The complaint[3] alleges that the defendants entered into a conspiracy, combination or contract in restraint of trade or commerce in that they attempted to establish a sole and exclusive fixed base operation at Logan in violation of Section 1 of the Sherman Act[4] and that each of them attempted to monopolize and combined or conspired to monopolize said business or operation in violation of Section 2 of the Sherman Act.[5]

The district court dismissed the suit on the ground that the complaint on its face does not state a claim upon which relief can be granted. Plaintiff appeals.

The facts stated most favorably to the plaintiff are as follows. For many years prior to February 1959 when the Authority took over the ownership, management and control of Logan, plaintiff and a competitor, known as Van Dusen,[6] conducted fixed base operations there. Both had

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"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, ..."

[2] A fixed base operation is one that provides facilities, fuel, equipment, supplies and services at an airport which are used by aircraft, crews, passengers and in handling freight connected therewith. It is vital to air transportation.

[3] Actually it is an amended complaint but the term complaint as used in this opinion means amended complaint.

[4] § 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, ... is declared to be illegal: . . . ." 15 U.S.C. § 1.

[5] § 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, . . . shall be deemed guilty of a misdemeanor, ..." 15 U.S.C. § 2.

[6] Its correct corporate name is Van Dusen Aircraft Supplies of New England, Inc.

leases from the State Airport Management Board.[7] Plaintiff's lease expired on December 31, 1959—Van Dusen's on December 31, 1961. Shortly before the expiration of plaintiff's lease, it asked the Authority for a renewal which was refused, but the plaintiff was allowed to continue its operation at the airport as a tenant at will on a month to month basis. The events that followed form the basis of this complaint and for that reason we relate them in some detail. In mid July 1960 the Authority wrote to a number of fixed base operators, including Van Dusen and the plaintiff, to the effect that it wished to enter into a lease for the fixed base operation at Logan and invited expressions of interest. Among those contacted was the defendant, Butler, who was conducting similar operations at several airports throughout the country. Plaintiff promptly informed the Authority of its interest and shortly thereafter submitted a proposal. In November both the plaintiff and Van Dusen appeared before the Authority and each of them expressed its readiness to undertake the operation.

In January 1961 plaintiff received another letter from the Authority stating that it had deemed it necessary that this proposed facility be conducted by a single operator but stated that it may negotiate with one or more firms before signing a lease and enclosed a list of requirements and qualifications. In response to this letter, plaintiff again advised the Authority that it was ready, able and willing to take on the operation but heard nothing further from the Authority until it received a letter dated February 10 informing it that Butler had been selected. About ten days later the Authority gave the plaintiff notice to vacate the airport premises occupied by it in not more than ninety days. Plaintiff claims that in order to comply with this

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[7] The Authority's predecessor that had operated the airport as an agency of the Commonwealth for several years.

eviction notice [8] it was forced to sell its business and equipment at Logan which Butler was able to buy at a very low figure. Subsequently the defendant, Butler-Boston, was formed as a subsidiary of Butler Company. A lease was then executed between the Authority and Butler-Boston whereby the latter would take over the Wiggins hangar as of July 1, 1961, and the Van Dusen hangar as of January 1, 1962.

Shortly after the plaintiff received the eviction notice it complained to the Federal Aviation Authority that the Port Authority's decision to establish Butler as its sole and exclusive fixed base operator violated the Federal Aviation Act.[9] Van Dusen joined in this complaint and in February 1962 the Administrator of FAA instructed the Authority to grant Van Dusen an extension allowing it to remain at Logan. In the same proceeding he also instructed the Port Authority to take steps to negotiate with all interested parties to correct the situation complained of. However, the FAA's intervention came too late to save the plaintiff. By that time it had sold its business and equipment at Logan and had departed from the airport. Shortly thereafter plaintiff endeavored to return to Logan but the Authority refused to grant it fueling privileges which rendered its return economically unwise. Van Dusen continues as a fixed base operator at Logan along with Butler-Boston.

Plaintiff contends that early in 1960 the Authority, through one of its members, contacted Butler and as a result of subsequent meetings the Authority and Butler entered into a conspiracy whereby the Authority would refuse to allow the plaintiff to remain at Logan; that the Authority would also refuse to renew the Van Dusen lease,

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[8] It moved out in mid April 1961.

[9] 49 U.S.C. § 1349.

thus excluding both of these operators from the airport and that Butler would then take over their operations and become the sole and exclusive fixed base operator at Logan.

Defendants contend that the Authority in its operation of Logan is acting as an agent of the Commonwealth of Massachusetts in the performance of a governmental function, and that a restraint or monopoly resulting from governmental action does not violate the Sherman Act. They further contend that even if the Authority were acting in a purely proprietary capacity, its agreement to make Butler-Boston the sole supplier of fixed base services at the airport would still not have violated the antitrust laws.[10] This leads us to consider what sort of body the Authority really is. By statute[11] it has been constituted a public instrumentality and the exercise of the powers conferred upon it is deemed and held to be the performance of an essential governmental function. It also has wide powers,[12] many of which are bestowed only upon instrumentalities of government.

As stated by the Massachusetts Supreme Judicial Court in *Opinion of the Justices,* 334 Mass. 731 (1956), 136 N.E. 2d 223, the Authority "is in no sense a private or business corporation. . . . It has no stockholders. No person can derive a profit through its operations. Only the public is to be benefited. . . ." It is described in the act creating it as "a body politic and corporate" which expression the Court said "is appropriate to a corporation to which is

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[10] Defendants Butler-Boston and Butler Company also claim that the only conduct alleged against them is in connection with the Authority's exercise of a governmental function which is not subject to the antitrust laws. Butler Company also contends that the complaint should be dismissed against it because the requirements of venue are not met and the cause of action against it is barred by the statute of limitations, but we do not reach these questions.

[11] Mass. St. 1956 c. 465.

[12] See fn. 11.

entrusted some of the powers of the state for public purposes." In the opinion of the Massachusetts Supreme Judicial Court, the Authority is a corporation of that character. The court also characterized the Authority "as a purely public corporation for public purposes—an arm of the State—analogous to a municipal corporation." Logan Airport is and always has been a public project.[13]

In carrying out its responsibilities the Authority decided that it was necessary to have only one fixed base operation at Logan and pursuant to that decision, entered into the lease with Butler-Boston. It is clear that in doing so it was acting as an instrumentality or agency of the state, pursuant to the legislative mandate imposed upon it to operate and manage the airport and establish rules and regulations for its use. Plaintiff's contention that the Authority in operating Logan Airport is engaged in a purely proprietary capacity and is conducting a private business has no merit. Nor does the arrangement with Butler-Boston violate the Sherman Act. What was done here was in the exercise of a valid governmental function. The antitrust laws are aimed at *private* action, not at governmental action. As stated by the Supreme Court in *Parker* v. *Brown*, 317 U.S. 341, 350-51 (1943):

> "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature . . . . The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. . . ."

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[13] Ever since it opened in 1923 it has been under public management and control, first by the City of Boston, later by the Department of Public Works of the Commonwealth, then by the Airport Management Board, and since 1959 by the Authority.

Our courts have repeatedly reaffirmed this principle. *Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *Eastern R. Conf.* v. *Noerr Motors*, 365 U.S. 127 (1961); *U. S.* v. *Rock Royal Co-op.*, 307 U.S. 533 (1939); *Miley* v. *John Hancock Mutual Life Insurance Co.*, 148 F. Supp. 299, *aff'd*, 242 F.2d 758 (1st Cir. 1957), cert. denied, 355 U.S. 828.

Plaintiff attaches much importance to the fact that under the statute creating it, the Authority can sue and be sued in its own name. From this premise it jumps to the conclusion that the Authority is not immune from liability under the antitrust laws. We cannot agree with this conclusion. Every member of a state agency has an existence distinct from that of the state and can be sued in his own name. But in carrying out the official duties with which the state charges him, he acts for the state and his action is not subject to the antitrust laws. In other words, we do not reach any question of immunity, since there was no attempt on the part of Congress to impose liability in the first place.

Plaintiff also urges that the action of the Authority in leasing to Butler-Boston is subject to the antitrust laws because it was taken pursuant to a conspiracy with Butler. We do not find any conspiracy sufficiently alleged in the complaint. All that the plaintiff alleges is that the Authority agreed with Butler to replace Wiggins and Van Dusen with Butler and make Butler the sole and exclusive fixed base operator at Logan; that Butler-Boston was created to carry out that agreement, and the Authority entered into a lease with Butler-Boston under which the latter was to become the sole operator. These facts do not make out a case of conspiracy nor from them can any conspiracy be reasonably inferred. This was a simple agreement or arrangement. The fact that it was exclusive does not under these circumstances necessarily make it a

conspiracy or make it illegal. See *Donovan* v. *Pennsylvania Company*, 199 U.S. 279 (1905); *Parmelee Transportation Company* v. *Keeshin*, 292 F.2d 794 (7th Cir. 1961), cert. denied, 368 U.S. 944, rehearing denied, 368 U.S. 972 (1962). In this connection, it should be noted that the only conduct of the defendants, Butler or Butler-Boston, alleged to have been in violation of the antitrust laws had to do with their dealings with the Authority in the exercise of a governmental function. If, as we have found, the Authority's conduct was lawful here it would be an unreasonable restriction on its freedom to hold that the other defendants acted illegally in having aided it.

We agree with the district court that the complaint on its face does not state a claim upon which relief can be granted. No other points raised need be considered.

Affirmed.

JUDGMENT

June 15, 1966.

This cause came to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(s) ROGER A. STINCHFIELD

Clerk.

Enter:

(s) ALDRICH, Ch.J.

Appendix B

Excerpts from Opinion of the Justices,
334 Mass. 731 (1956) 136 N.E. 2d. 223

1. SUMMARY OF ENABLING ACT, Mass. St. 1956 c. 465 set forth in the Opinion, pages 724-728

The summary relates to the then ". . . pending bill creating the Massachusetts Port Authority, hereinafter called the Authority, to take over, finance, and operate the existing East Boston vehicular tunnel, known as the Sumner tunnel, the State owned airports at East Boston and Bedford, the Mystic River Bridge, and the 'port properties,' consisting of piers and harbor facilities, and to finance, construct, and operate an additional crossing by bridge or tunnel between Boston proper and East Boston.

The bill comprises thirty closely printed pages, including in § 1 about five pages of definitions of the terms employed. We shall attempt to summarize only the portions of the bill that seem directly involved in the questions asked.

The Authority is to be 'placed in the department of public works,' but 'shall not be subject to the supervision or regulation of the department of public works or of any department, commission, board, bureau or agency of the commonwealth except to the extent and in the manner provided in this act.' It is described as 'a body politic and corporate.' It is 'constituted a public instrumentality and the exercise by the Authority of the powers conferred by this act shall be deemed and held to be the performance of an essential governmental function.' The Authority is to consist of seven members appointed by the Governor with the advice and consent of the Council for terms of seven years, with provision for staggered terms and for removal

of members by the Governor with the advice and consent of the Council for certain causes mentioned. § 2.

Among the powers granted to the Authority by § 3 are these:

To adopt by-laws for the regulation of its affairs and the conduct of its business, and to fix penalties not in excess of $100 for violation thereof.

To adopt an official seal.

To sue and be sued in its own name.

To extend, enlarge, improve, rehabilitate, lease as lessor or as lessee, maintain, repair, and operate the projects under its control, and to establish rules and regulations for the use of any such project, subject to exceptions as to the operation of aircraft and the powers of police officers not here material.

To issue its revenue bonds, payable solely from revenues.

To fix and to revise tolls, rates, fees, rentals, and other charges for the use of any project under its control, with certain qualifications not material here.

'To acquire, hold and dispose of real and personal property in the exercise of its powers and the performance of its duties under this act.'

'To acquire in its own name by purchase or otherwise, on such terms and conditions and in such manner as it may deem proper, or by the exercise of the power of eminent domain . . . . such public or private lands . . . as it may deem necessary for carrying out the provisions of this act; provided, that the Authority shall act in its name and on its behalf in exercising its functions under this clause. . . .'

To apply for and receive Federal grants.

'To make and enter into all contracts and agreements necessary or incidental to the performance of its duties . . . .''

Section 4 contains further power to acquire property by purchase 'and to take title thereto in the name of the

Authority,' and to acquire 'in its own name by purchase or otherwise' or to take by eminent domain real estate. Provision is made for the relocation or removal of tracks and public utilities.

'Title to the airport properties shall be vested in the Authority,' and possession shall be transferred to it upon the payment to the treasurer of the Commonwealth of the aggregate principal amount of certain bonds of the Commonwealth issued under certain previous enactments and of a sum equal to the aggregate cash payments under certain other previous acts. § 5.

'[T]itle to the port properties shall be vested in the Authority' and possession shall be transferred to it upon the issue of revenue bonds and the application of their proceeds under § 8, certain payments being made to the treasurer of the Commonwealth until there shall have been paid a sum equal to payments previously made by the Commonwealth under certain statutes and to the principal outstanding amounts of certain bonds of the Commonwealth issued under certain enumerated statutes, and interest thereon after the transfer. § 6.

By § 8 the Authority is given power to issue 'revenue bonds of the Authority' to provide funds for refunding the Mystic River Bridge revenue bonds, paying to the city of Boston $2,619,380 heretofore paid by the city for operating deficits of the Sumner tunnel, paying to the city $5,300,000, 'determined to be the amount,' in addition to the amount of other sums mentioned, 'due the city in payment of just compensation for the tunnel,' paying to the commissioners of sinking funds of the city the principal of outstanding tunnel bonds, paying the cost of the additional crossing, making the required payments to the treasurer of the Commonwealth for the airport properties, and making some other payments that need not be detailed here. This section further provides that the payments to the city of

Boston and its sinking fund commissioners for the Sumner tunnel shall be presumed to constitute just compensation for the tunnel, if accepted or not rejected by vote of the city council within sixty days after the effective date of the act.

'The principal of and the interest on all bonds issued under the provisions of this act shall be payable solely from the funds provided therefor from revenues as herein provided.' § 10. The bonds 'shall not be deemed to constitute a debt of the commonwealth or of any political subdivision thereof or a pledge of the faith and credit of the commonwealth or of any such political subdivision, but such bonds shall be payable solely from the funds herein provided therefor from revenues.' § 11.

The bonds are to be 'secured' by a trust agreement between the Authority and a corporate trustee with which the proceeds of the bonds shall be deposited and which shall make the payments hereinbefore mentioned. Subject to qualifications the trust agreement may pledge or assign the tolls and other revenues. § 12.

Upon the issuance of revenue bonds and the application of the proceeds as provided in § 8 'title to the Mystic River bridge and to the Sumner tunnel shall be vested in the Authority,' and 'said bridge and tunnel shall thereafter be maintained, repaired and operated by the Authority . . . .' § 13.

The authority is authorized to fix tolls, rates, fees, rentals and other charges, to be so fixed and adjusted as to provide a fund sufficient to pay current expenses, to meet sinking fund requirements for the outstanding tunnel bonds, to pay the principal and interest on all bonds to be issued under the act and for certain other payments mentioned in the act. 'Such tolls, rates, fees, rentals and other charges shall not be subject to supervision or regulation by any department, division, commission, board, bureau or agency of the commonwealth or any political subdivision thereof.' § 14.

All moneys received pursuant to the authority of the act shall be deemed trust funds to be held and applied solely as provided in the act. § 15.

The Authority shall not be required to pay any taxes or assessments upon any property acquired or used under the act or upon income therefrom, and the bonds issued under the act, their transfer, and the income therefrom, including profit on sale thereof, are to be free from taxation within the Commonwealth, with certain qualifications as to lands of the Authority leased for business purposes. § 17.

Under the heading 'Freedom from Competition' are provisions that so long as any bonds issued under the act are outstanding no bridge, tunnel, or ferry for vehicular traffic shall be constructed within certain limits by the Commonwealth or any political subdivision thereof or by any public instrumentality other than the Authority and no franchise shall be granted for any bridge, tunnel or ferry for such traffic. § 20.

The Authority is to be liable for injury or death by reason of defects or want of repair of its ways to the same extent as a municipal corporation would be liable. § 23.

When all payments due under § 6 shall have been made and all bonds issued under the act and interest thereon have been paid or a sufficient amount in trust has been set aside therefor, all projects under the control of the Authority 'shall be operated and maintained in such manner as may be provided by the general court.' § 25.

II. Interpretation of the Act.

The Court (pp. 733-734) more fully described the Authority as follows:

> "It is 'placed' in the department of public works, but only nominally so, since it is not to be subject to super-

vision or regulation in the ordinary sense of that or of any other department. § 2. Yet is it constituted 'a public instrumentality,' and the exercise of its powers 'shall be deemed and held to be the performance of an essential governmental function,' and this provision is consistent with the nature of the Authority's powers and duties in relation to airports, wharves, tunnels, and bridges, all of which have to do with the establishment and maintenance of means of public travel. Clearly these are matters of public concern. The further duties of investigation and report contained in § 3(f) and not hereinbefore summarized are largely incidental to the other duties and in any event do not detract from the public character of the Authority. On the other hand, there are other provisions that indicate strongly that the Authority is not merely a board or commission of the State government. It is to sue and be sued in its own name. §3(d). It is to acquire property in its own name, the title to which is to be in it and not in the Commonwealth. § 3(j), (k); §§ 4, 5, 6, 13. It is to make contracts (§ 3[o]) and to issue bonds (§ 8) which shall not be the bonds of the Commonwealth. § 11. It seems therefore that the Authority must constitute an entity in itself and must have an existence apart and distinct from that of the Commonwealth. *Johnson-Foster Co.* v. *D'Amore Construction Co.* 314 Mass. 416, 419. *Opinion of the Justices*, 322 Mass. 745, 751-753. In substance it has many important attributes of a corporation, and nothing other than a corporation would seem to satisfy the requirements of its being. But it is in no sense a private or business corportation. Its members are to be appointed by the Governor with the advice and consent of the Council. It has no stockholders. No person can derive a profit through its operations. Only the public is to be benefited. The

Authority therefore bears considerable analogy to a municipal corporation, although it can hardly be said to possess a territory of its own, and it exercises only limited governmental powers. It is described in § 2 as 'a body politic and corporate.' This expression is frequently used in city charters and is appropriate to a corporation to which is entrusted some of the powers of the State for public purposes. In our opinion the Authority would be a corporation of that character. See *Opinion of the Justices*, 330 Mass. 713."

Appendix C

FEDERAL AVIATION AGENCY

Exclusive Rights At Airports
Policy Statement

1. *Purpose.* It is the purpose of this Statement to set forth Agency policy on the conduct of aeronautical activities at public airports on which Federal funds, administered by the Agency, have been expended. It does not apply to the conduct of aeronautical activities by a governmental authority using its own employees, facilities and resources.

* * *

3. *Background.* Since the enactment of the Civil Aeronautics Act of 1938, there have been statutory prohibitions against the grant of an exclusive right to conduct an aeronautical activity at an airport on which Federal funds have been expended. The Policy Statement of July 17, 1962, identified the types of activities covered by the legislation and provided guidance as to the manner in which the law would be interpreted and applied. Based on the experience in applying this policy over the past three years, this Statement restates the Agency's interpretation of the legislation.

4. *Pertinent laws and regulations.* a. Section 308 (a) of the Federal Aviation Act provides that "there shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended." Identical language was contained in section 303 of the Civil Aeronautics Act of 1938.

* * *
* * *
* * *

5. *Definitions.* For the purpose of this Policy Statement the following definitions apply:

a. *Exclusive right.* A power, privilege, or other right excluding or debarring another from enjoying or exercising a like power, privilege, or right. An exclusive right may be conferred either by express agreement, by imposition of unreasonable standards or requirements, or by any other means. Such a right conferred on one or more parties but excluding others from enjoying or exercising a similar right or rights would be an exclusive right.

b. *Aeronautical activity.* Any activity which involves, makes possible, or is required for the operation of aircraft, or which contributes to or is required for the safety of such operations.

The following activities, commonly conducted on airports, are aeronautical activities within this definition: charter operations, pilot training, aircraft rental and sightseeing, aerial photography, crop dusting, aerial advertising and surveying, air carrier operations, aircraft sales and services, sale of aviation petroleum products whether or not conducted in conjunction with other included activities, repair and maintenance of aircraft, sale of aircraft parts, and any other activities which because of their direct relationship to the operation of aircraft can appropriately be regarded as an "aeronautical activity."

The following are examples of what are not considered aeronautical activities: ground transportation (taxis, car rentals, limousines); restaurants; barber shops; auto parking lots.

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No. 542

In The Supreme Court of The United States

OCTOBER TERM, 1966

E. W. WIGGINS AIRWAYS, INC.,
Petitioner

v.

MASSACHUSETTS PORT AUTHORITY,
BUTLER AVIATION-BOSTON, INC.,
and BUTLER COMPANY,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS BUTLER AVIATION-BOSTON, INC., AND BUTLER COMPANY, IN OPPOSITION

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No. 542

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E. W. WIGGINS AIRWAYS, INC.,
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and BUTLER COMPANY,
Respondents

BRIEF FOR RESPONDENTS BUTLER AVIATION-BOSTON, INC., AND BUTLER COMPANY, IN OPPOSITION

QUESTION PRESENTED

Whether a treble-damage complaint under Sections 1 and 2 of the Sherman Act was properly dismissed, where the only conduct alleged to have been in violation of the Act consisted of a decision by a public instrumentality operating a public airport that fixed base operations at that airport should be the responsibility of a single operator rather than of multiple operators, and the selection of a single operator other than petitioner, one of the existing operators.

STATEMENT OF THE CASE

The District Court for the District of Massachusetts dismissed the petitioner's amended complaint (hereinafter referred to merely as "the complaint") as against all three defendants for failure to state a claim under the antitrust laws upon which relief could be granted. The Court of Appeals for the First Circuit unanimously affirmed upon the same ground.

The essential allegations of the complaint were as follows. For some years petitioner and two competitors had been conducting fixed base operations (*i.e.*, ground services) at Logan International Airport in Boston, Massachusetts, since February 1959 under lease from the respondent Massachusetts Port Authority, a "body politic and corporate" created by the Massachusetts Legislature in part for the purpose of owning and managing this public airport. Petitioner's lease expired December 31, 1959. The Authority allowed petitioner to continue its operations thereafter "as a tenant-at-will on a month-to-month basis". In July 1960 the Authority, acting through its Vice Chairman, invited petitioner, along with one of its competitors and seven other fixed base operators, including respondent Butler Co. (hereinafter Butler), to submit proposals for fixed base operations at Logan, and petitioner was one of those submitting proposals. On January 4, 1961, the Authority announced that it contemplated having only one fixed base operator at Logan, and on February 10, 1961, the Authority stated that it had selected Butler as that one. On February 21, 1961, the Authority notified petitioner to vacate its premises within 90 days.

On March 2, 1961, petitioner (and its chief competitor, whose lease had not expired) filed a complaint with the Federal Aviation Agency alleging that fixed base operation by a single operator violated 49 U.S.C. § 1349. A month and a half later, "by the middle of April 1961", petitioner had sold its property to Butler and had vacated its premises at Logan. Between that time and June of 1961, Butler operated the fixed base operation at Logan. Thereafter respondent Butler Aviation-Boston, Inc. (hereinafter Butler-Boston), a Butler subsidiary incorporated in late May of 1961, took over that operation, and subsequently executed a lease with the Authority. In February 1962, the F.A.A. ordered the Authority to allow petitioner's former chief competitor to continue its fixed base operation (which

had never been discontinued) at Logan. It made no such order as to petitioner, but made other more general orders with which the complaint alleges the Authority has not complied.

The complaint alleged that the Authority's acts were taken pursuant to a conspiracy to replace petitioner (and its chief competitor) with Butler. It demanded treble damages, and also sought extensive equitable relief, including the restoration of petitioner to substantially its prior position and cancellation of parts of the Authority's lease to Butler-Boston. As mentioned, the courts before whom this complaint has come have unanimously held that it failed to state a claim under the antitrust laws upon which relief could be granted.

ARGUMENT

I. The Decision Below is Clearly Correct.

The gist of the complaint was that pursuant to an alleged conspiracy among the three respondents, the Authority terminated petitioner's fixed base operations as a tenant at will at Logan Airport and selected Butler as the sole fixed base operator. The alleged conspiracy goes no further than this, and in this connection it should be noted that petitioner itself was entirely willing to be the sole fixed base operator if selected. (R. 11.) The proposition that the Authority's actions were not subject to a private antitrust suit is fully maintained in the brief in opposition to certiorari filed by the Authority, but certain aspects should be emphasized here.

The action of the Authority clearly was taken by it in the fulfillment of its public functions as the governmental agency — the arm of the Commonwealth of Massachusetts — that owns and manages Logan Airport. The Authority is "a purely public corporation for public purposes — an arm of the State". *Opinion of the Justices*, 334 Mass. 721,

735, 136 N.E. 2d 223, 232 (1956). Contrary to petitioner's assertion, the Authority may not "act without any supervision by the state creating" it. (Petition p. 10.) It is required to make "an annual report of its activities for the preceding fiscal year to the governor and to the general court", including an independent audit and "a complete operating and financial statement." Mass. St. 1956, c. 465, § 21. Its members may not have an interest in its contracts, sales, or leases, *id.* § 23, and may be removed by the Governor "for misfeasance, malfeasance or willful neglect of duty," *id.* § 2. The Legislature may at any time revoke or amend its governing statute. *Opinion of the Justices,* 334 Mass. 721, 735-738, 136 N.E. 2d 223, 232-233 (1956).

Leaving aside (1) the immunity of such a governmental agency from suit except to the extent of consent, (2) the limits imposed by the Constitution on the power of Congress to regulate state governmental activity, and (3) the respect for state activities conducted on state property called for in a healthy federal system, Congress has not in fact sought to make such state activity subject to the antitrust laws. *Parker* v. *Brown,* 317 U.S. 341, 350-352 (1943). *Eastern RR. Presidents Conf.* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127, 135-136 (1961). *United Mine Workers* v. *Pennington,* 381 U.S. 657, 669-670 (1965).

Petitioner apparently does not question this well established principle, but seeks rather to construct an exception to it where the officer or agency acts not as such but as "a participant in a private agreement or combination by others for restraint of trade." (Petition, p. 10.) Regardless of the merits of this theory, it has no application here. The complaint affirmatively shows that no such combination of private parties existed. The Authority was certainly not a private party. Of the two alleged private conspirators, only Butler was in existence when the alleged agreement with the Authority was made. Butler-Boston, Butler's subsidiary, did not come into existence until over a month after

petitioner had sold its property and vacated the premises. No other private party is alleged to have been involved.

Moreover the Authority (to say nothing of the private respondents) is alleged to have done nothing here beyond terminating petitioner's operation and selecting Butler. This is a far cry from taking an action which was one step in a plan to monopolize a whole industry throughout the state, as was the case in *Harman* v. *Valley National Bank*, 339 F. 2d 564, 566 (9th Cir. 1964), the only case petitioner cites in support of its contention. To conclude that the action taken here by the Authority, in the discharge of its statutory obligations as a state agency running a public airport, constituted "participation in a private conspiracy" rather than the legitimate action of a governmental agency would be to overthrow the firm principle of Congressional noninterference with state business.

The substantial facts alleged in the complaint acquired no additional or sinister significance by attaching to them the label of "conspiracy". Even the broadest connotation of that conclusory term would not be appropriate to describe the dealings of the respondents with each other, including the communications, meetings, and negotiations incidental to the Authority's governmental action. *Cf. Schwing Motor Co.* v. *Hudson Sales Corp.* 138 F. Supp. 899, 906 (D. Md.), *aff'd. per curiam* 239 F. 2d 176 (4th Cir. 1956), *cert. denied* 355 U.S. 823 (1957); *Packard Motor Car Co.* v. *Webster Motor Car Co.* 243 F. 2d 418, 421 (D.C. Cir.), *cert. denied* 355 U.S. 822 (1957).

To find a legitimate antitrust claim in the alleged attempt to establish Butler as the exclusive fixed base operator at Logan would interfere with the inherent monopoly one is entitled to enjoy over one's own product or property, and would result in the Authority's inability to terminate unsatisfactory licensees and operators or to change the number of such operators. See *Donovan* v. *Pennsylvania Co.* 199 U.S. 279, 295-297 (1905); *Delaware, L. & W. RR.* v. *Morris-*

town, 276 U.S. 182, 192 (1928); *Parmelee Transportation Co.* v. *Keeshin,* 292 F. 2d 794, 803-805 (7th Cir.), *cert. denied* 368 U.S. 944 (1961). Where the licensor is a state agency, the effect of such an antitrust rule would be to stultify state policy and to interfere with state regulation and control of its own property. See *Parker* v. *Brown,* 317 U.S. 341, 352 (1943); *Olsen* v. *Smith,* 195 U.S. 332, 344-345 (1904). *Cf. United States* v. *Gray Line Water Tours,* 311 F. 2d 779 (4th Cir. 1962). Here there was plainly no absolute exclusion of competition: petitioner was given opportunity to present its proposals. *Cf. Parmelee Transportation Co.* v. *Keeshin, supra,* at 803-804. No coercion whatever is alleged.

It is thus clear that the conduct of the Massachusetts Port Authority of which the petitioner complained does not support petitioner's claim under the antitrust laws. Recent cases of this Court have established that where the only activities of a private party were in conjunction with and inseparably a part of governmental activity, as is beyond question the case here, no antitrust claim is made out against those private parties. In *Eastern RR. Presidents Conf.* v. *Noerr Motor Freight, Inc.* 365 U.S. 127 (1961), the respondents were private parties who had successfully attempted to influence state action. This Court held that a private antitrust action against such private parties would necessarily impair the ability of the affected state government to act. *Id.* at 137. It also held that where lawful action was taken, the motive inspiring it was irrelevant. *Id.* at 138-139. The case is thus a square holding in respondents' favor in the present case. In *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965), this Court expressly reaffirmed the main holdings of *Noerr, supra.* Again the respondents were private parties. If private parties could be attacked for accepting or even seeking the benefits of governmental action, that action — the expression of state policy — would be frustrated.

The weakness of the petitioner's complaint is further indicated by the fact that even if the acts complained of had been performed by a private party and not by an arm of the state government they would not support an antitrust claim. Petitioner's claimed damage all arises from the termination of its tenancy at the airport. The complaint affirmatively shows that petitioner had no lease and received three times the notice legally required to terminate its tenancy at will. See Mass. Gen. Laws, c. 186, § 12. Neither had petitioner any legal right to the renewal of any franchise, concession or contract, or to have its bid or proposition accepted. *Hudson Sales Corp.* v. *Waldrip,* 211 F. 2d 268, 274 (5th Cir.), *cert. denied* 348 U.S. 821 (1954). *Friend* v. *Lee,* 221 F. 2d 96, 100 (D.C. Cir. 1955). *Edelman* v. *Federal Housing Admin.* 251 F. Supp. 715, 718 (E.D. N.Y. 1966). Nor was the Authority's attempt to convert to a single fixed base operator system in violation of the Sherman Act. See *United States* v. *Yellow Cab Co.* 332 U.S. 218, 229 (1947); *Schwing Motor Co.* v. *Hudson Sales Corp.* 138 F. Supp. 899 (D. Md.), *aff'd per curiam* 239 F. 2d 176 (4th Cir. 1956), *cert. denied* 355 U.S. 823 (1957); *Packard Motor Car Co.* v. *Webster Motor Car Co.* 243 F. 2d 418 (D.C. Cir.), *cert. denied* 355 U.S. 822 (1957); *Parmelee Transportation Co.* v. *Keeshin,* 292 F. 2d 794 (7th Cir.), *cert. denied* 368 U.S. 944 (1961); *Susser* v. *Carvel Corp.* 332 F. 2d 505, 517 (2d Cir. 1964), *cert. dism.* 381 U.S. 125 (1965). *Cf. Ace Beer Distributors, Inc.* v. *Kohn, Inc.* 318 F. 2d 283 (6th Cir.), *cert. denied* 375 U.S. 922 (1963). Moreover, petitioner's alleged claim of damage arises from the termination of its tenancy at will. It does not arise from any later uncompleted attempt to terminate the operations of its competitors. This case is governed by the decisions just cited rather than by *Gamco, Inc.* v. *Providence Fruit & Produce Bldg.* 194 F. 2d 484 (1st Cir.), *cert. denied* 344 U.S. 817 (1952), and *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464 (1961), where the termination of the lease or franchise was by competitors of the excluded party,

a category into which the Massachusetts Port Authority cannot possibly be fitted. Of course, any possibly arguable violation of the Federal Aviation Act is not to be remedied by an antitrust action. See *Hunt* v. *Crumboch,* 325 U.S. 821, 826 (1945); *Parmelee Transportation Co.* v. *Keeshin,* 292 F. 2d 794, 804 (7th Cir.), *cert. denied* 368 U.S. 944 (1961); *Sterling Nelson & Sons, Inc.* v. *Rangen, Inc.* 235 F. Supp. 393, 400 (D. Idaho, 1964).

Thus, even if no governmental activity had been involved, the matters alleged in this complaint would not have constituted a violation of the antitrust laws. All of the alleged activities were, however, undertaken in the performance of governmental functions. Looking to the private respondents alone, their only conduct alleged to have been in violation of the Sherman Act was in connection with their dealings with the Massachusetts Port Authority, pursuant to that Authority's exercise of governmental operations entrusted to it by the legislature — operations repeatedly and unequivocally held by this and lower federal courts not to be within the reach of existing antitrust legislation. The decision below was thus clearly correct.

In addition to these matters going directly to the merits of the complaint, the decision was also correct because the complaint showed that petitioner's remedy, if any, was elsewhere. Petitioner claims that the change to one fixed base operator would have violated the Federal Aviation Act, 49 U.S.C. § 1349. Pursuant to that claim the petitioner sought redress before the Federal Aviation Agency, the administrative body to which the interpretation and application of this part of the Act are committed. See 49 U.S.C. §§ 1341(a), 1346, 1348. Hearings were held before examiners who issued decisions, and petitioner, objecting to the results, appealed to the Agency, which issued its decision. Either petitioner got what it was entitled to, or it could and should have sought judicial review of that decision, which it did not. Petitioner's claims that the Author-

ity thereafter failed to comply with the Agency's decision should be channeled into the appropriate proceedings for enforcement of that decision. By seeking in an antitrust suit the broad equitable relief outlined in its complaint, petitioner is in effect collaterally attacking the Agency's refusal to give it all it sought in the prior administrative proceeding, without having exhausted its direct adminstrative remedies and without allowing the Agency to formulate, maintain or defend its interpretation of the Act.

II. THE CASE PRESENTS NO QUESTION THAT THIS COURT NEED DECIDE.

This case presents no novel or important federal question. The cases cited above clearly cover the questions, as raised in this case, of the application of the antitrust laws to governmental activities (*e.g., Parker* v. *Brown, Eastern RR. Presidents Conf.* v. *Noerr Motor Freight, Inc., United Mine Workers* v. *Pennington*) and to exclusive contracts for services auxiliary to transportation centers (*e.g., United States* v. *Yellow Cab Co., Parmelee Transportation Co.* v. *Keeshin*). Airports are not significantly different from train stations and bus terminals in any respect pertinent to this case.

Neither does this case present any conflict either with applicable decisions of this Court or among the circuits. The three cases cited by the petitioner as being in conflict are distinguishable, as pointed out above. *Harman* v. *Valley National Bank*, 339 F. 2d 564 (9th Cir. 1964), involved action that was illegal under state law and was part of a conspiracy to establish an illegal statewide monopoly. The conspiracy existed before, and independently of, the entry of the State Attorney General into it. In the present case no independent or pre-existing conspiracy was alleged and the action taken was clearly authorized by the governing state statute. In *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464 (1961), there was also a broad "unnatural" monopoly in-

tended, with no governmental agency involved, merely private competitors. In *Gamco, Inc. v. Providence Fruit & Produce Bldg.* 194 F. 2d 484 (1st Cir.), *cert. denied* 344 U.S. 817 (1952), where competitors conspired to exclude a competitor, no governmental agency was involved.

Accordingly, no conflict is presented with any applicable decision of this Court. Nor is there any conflict with the decisions in the various circuits. As indicated above, the issues presented are fully governed by settled law expounded in well-reasoned decisions of long standing.

CONCLUSION

For the reasons presented, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 542

E. W. WIGGINS AIRWAYS, INC.,
PETITIONER,

v.

MASSACHUSETTS PORT AUTHORITY ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE MASSACHUSETTS PORT AUTHORITY IN OPPOSITION

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In the
Supreme Court of the United States

OCTOBER TERM, 1966

No. 542

E. W. WIGGINS AIRWAYS, INC.,
PETITIONER,

v.

MASSACHUSETTS PORT AUTHORITY, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE MASSACHUSETTS PORT AUTHORITY IN OPPOSITION

Question Presented

Whether an agency of a state, which owns and operates a public airport in the performance of the State's governmental function, violates Sections 1 or 2 of the Sherman Act by arranging to have fixed base services conducted thereon by a single operator.

Statement

The original complaint in this action, charging that defendant Butler Aviation-Boston, Inc. (Butler-Boston) had conspired and combined to restrain and monopolize "fixed base" operations at Logan International Airport in East Boston, Massachusetts, was filed in March, 1963 (Pet. 4; R. 1).[1] The parties then engaged in discovery proceedings through the production of documents and interrogatories (R. 3-4). In April, 1965, two years after the action had been begun, an amended complaint was filed (R. 25), and an additional party defendant, Butler Company, the parent of defendant Butler-Boston, was added (R. 3, 41-43). Motions by the defendants to dismiss the amended complaint (R. 4, 43-44) were granted (Pet. 4; R. 2, 46) and the judgment of dismissal was affirmed (Pet. 4; Appendix A, 8a).

The essential allegations of the amended complaint are as follows:

Plaintiff, E. W. Wiggins Airways, Inc. (hereinafter referred to as "Wiggins"), and Van Dusen Aircraft Supplies of New England, Inc. (hereinafter referred to as "Van Dusen") had been engaged in conducting so-called "fixed base operations" at Logan International Airport in East Boston, Massachusetts (R. 8, ¶ 11). That airport had been managed and controlled originally by the City of Boston (R. 7; ¶ 10); thereafter by the Department of Public Works of the Commonwealth of Massachusetts (R. 7; ¶ 10); and then by the State Airport Management Board, an agency of the Commonwealth (R. 8, ¶ 12). In February, 1959, ownership of the airport, and its operation, control and management, were vested in the Massachusetts Port Authority (hereinafter referred to as the "Authority") under the provisions of St. 1956, c. 465 (R. 6,

[1] References indicated "R." are to petitioner's record appendix. References to the amended complaint are to the page of the record appendix followed by the paragraph of the complaint—*e.g.* "R. 8, ¶ 12".

¶ 3; R. 7, ¶ 10), (hereinafter referred to as the "Enabling Act").

Wiggins had a three-year lease from the State Airport Management Board to conduct fixed base operations which was due to expire on December 31, 1959 (R. 8, ¶ 12). Van Dusen's similar lease was to expire on December 31, 1961 (R. 8, ¶ 12). After taking over control of the airport, the Authority notified Wiggins that its lease would not be renewed but that it might continue as tenant-at-will on a month-to-month basis (R. 9, ¶ 15) and Wiggins did so continue for the next sixteen months (R. 13, § 32).

In early 1960, the Authority entered into a "conspiracy" with defendant Butler Company to make Butler the sole fixed-base operator at Logan (R. 10-11, ¶ 21). In January, 1961, the Authority advised Wiggins that it deemed it necessary that the facility be operated by one operator but that it might negotiate with one or more operators before selecting a firm (R. 11, ¶ 25). In February, 1961, it notified Wiggins that it had selected Butler (R. 12, § 26) and that Wiggins was to vacate the premises in ninety days (R. 12, ¶ 26). Wiggins left the airport in April, 1961 (R. 13, ¶ 32), after selling its business and property to Butler (R. 12, ¶ 29).

In May, 1961, defendant Butler-Boston was incorporated as a subsidiary of Butler Company (R. 13, ¶ 31) and in September the Authority entered into a lease with Butler-Boston under which Butler-Boston was to become the sole fixed base operator (R. 14, ¶ 33). As a result of a complaint filed with the Federal Aviation Agency by Wiggins and Van Dusen, the Administrator of the FAA in February, 1962, directed the Authority to extend Van Dusen's lease and to negotiate with all interested parties (R. 14, ¶ 34). By that time, Wiggins was no longer at the airport, having left a year before (R. 12-13, ¶ 29; R. 13, ¶ 32). Van Dusen, however, still continued its operations (R. 15-16, ¶ 39). Thus,

whereas prior to 1961 the two fixed base operators were Van Dusen and Wiggins, thereafter they were Van Dusen and Butler-Boston.

The amended complaint charges that the effect of the Authority's action was to "limit or foreclose competition" in the conduct of fixed base operations at Logan and to deprive the public of the benefits "derived from unrestrained competition" among fixed base operators (R. 15, ¶ 38) and that "based upon the foregoing", the defendants had conspired to restrain and monopolize, and attempted to monopolize, the business of fixed base operations at Logan in violation of Sections 1 and 2 of the Sherman Act (R. 16, ¶ 40, 41).

The court below held that the only conspiracy alleged was "a simple agreement or arrangement" (Pet. 7a) by the Authority to designate Butler as the sole fixed-base operator at Logan; that in deciding that it was necessary to have only one such operator and in entering into that arrangement, the Authority acted as an agency of the Commonwealth of Massachusetts, pursuant to its statutory duty to operate the airport and to establish regulations for its use (Pet. 6a); that, as this Court and other Federal courts have consistently held, action by the Authority in the exercise of a valid governmental function did not violate the Sherman Act (Pet. 6a-7a); and that, in any event, the exclusive arrangement was not in itself illegal (Pet. 7a-8a). Accordingly, it agreed with the District Court that on its face the amended complaint did not state a claim on which relief could be granted (Pet. 8a).

Argument

Far from involving an "important and novel question" (Pet. 8), this case is merely an example of the well-settled principle that "where a restraint upon trade or monopo-

lization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out". *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 136. That rule has been consistently applied.[2] The holding of the court below is in full accord with the authorities and does not conflict with any applicable decision of this Court or of any Court of Appeals.

Petitioner distorts the issue involved in stating that the Authority "is not subject to supervision by the state" (Pet. 1) that its "activities are not directed by the state" (Pet. 9) and that it "is acting in a proprietary capacity" (Pet. 2). These assertions are unfounded. The Authority is not identical with the Commonwealth of Massachusetts, of course; nor is it one of the established executive departments of the Commonwealth. But, as the court below held, in taking the action complained of, it acted as an

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[2] *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 671 (United States Secretary of Labor); *Parker* v. *Brown*, 317 U.S. 341, 350, 352 (California Director of Agriculture and members of the State Agricultural Prorate Advisory Commission); *United States* v. *Rock Royal Cooperative, Inc.*, 307 U.S. 533, 557-560 (United States Secretary of Agriculture and producer associations); *Floyd* v. *Gage*, 192 F. 2d 137 (4th Cir.) (State Banking Commission); *Miley* v. *John Hancock Mutual Life Insurance Company*, 148 F. Supp. 299 (D. Mass.) *aff'd* 242 F. 2d 758 (1st Cir.), *cert. denied* 355 U.S. 828 (Massachusetts State Employees Group Insurance Commission); *Allstate Insurance Co.* v. *Lanier*, 242 F. Supp. 73 (D.N.C.), *aff'd* 361 F. 2d 873 (4th Cir.) (State Insurance Commissioner); *Brechtel* v. *Board of Examiners of Bar Pilots for the Port of New Orleans*, 230 F. Supp. 18 (E.D. La.) (State boards and commissions relating to licensing of pilots); *Stroud* v. *Benson*, 155 F. Supp. 482 (E.D. N.C.), *vacated and dismissed for lack of jurisdiction*, 254 F. 2d 448 (4th Cir.) (contracts between State cooperative and warehousemen pursuant to regulations of Secretary of Agriculture); *Hitchcock* v. *Collenberg*, 140 F. Supp. 894 (D. Md.) *aff'd* 353 U.S. 919 (1957) (State Board of Medical Examiners); *United States* v. *Yellow Cab Co.*, 69 F. Supp. 170 (N.D. Ill.), *rev'd on other grounds*, 332 U.S. 218 (issuance of taxicab licenses by city); *Lowenstein* v. *Evans*, 69 Fed. 908 (C.C.S.C.) (state liquor monopoly).

agency of the Commonwealth, pursuant to legislative mandate, in the performance of a governmental function of the Commonwealth (Pet. Appendix A, 6a).

The Authority was created in 1956 to take over the operation, maintenance and development of several public projects—*i.e.*, port facilities in the port of Boston, a toll bridge (Mystic River Bridge) and two public airports (Logan International Airport and Hanscom Field)—all of which had theretofore been operated through other departments, boards, commissions or agencies of the Commonwealth.[3] The construction, operation and development of such projects have long been recognized as functions of government.[4] To perform these functions of the Commonwealth, the Authority was created, by Section 2 of the Enabling

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[3] As to the properties in the *Port of Boston*, see St. 1911, c. 748 (Directors of the Port of Boston); St. 1945, c. 619 (Port of Boston Authority); and St. 1953, c. 608 (Port of Boston Commission). As to the *Mystic River Bridge*, see St. 1946, c. 562, as amended by St. 1947, c. 626, and St. 1954, c. 432 (Mystic River Bridge Authority). As to *Logan Airport*, see St. 1928, c. 246 (Massachusetts Department of Public Works); Res. 1928, c. 64, and Res. 1930, c. 53 (City of Boston); Res. 1941, c. 8 and St. 1941, c. 695 (Massachusetts Department of Public Works); and St. 1948, c. 637 (State Airport Management Board and Commissioner of Airport Management). As to *Hanscom Field*, see St. 1939, c. 393 (Massachusetts Aeronautics Commission); and St. 1948, c. 637, and St. 1955, c. 769 (State Airport Management Board and Commissioner of Airport Management). (The Commissioner "was, in effect, replaced by the Authority which assumed his duties". *McGrath* v. *Massachusetts Port Authority*, Mass. Adv. Sh. (1966) 84, 213 N.E. 2d 397.) Every one of the essential powers now entrusted to the Massachusetts Port Authority by the Enabling Act is found in one or more of the statutes cited above.

[4] See, *e.g.*, as to bridges: *Kansas City Bridge Co.* v. *Alabama State Bridge Corporation*, 59 F. 2d 48 (5th Cir.), *rehearing denied*, 59 F. 2d 1065, *cert. denied* 287 U.S. 644; as to ports: *Commissioner of Internal Revenue* v. *Ten Eyck*, 76 F. 2d 515 (2d Cir.); *In re Application of the Mayor, etc. of the City of New York*, 135 N.Y. 253; as to airports: *Hesse* v. *Rath*, 249 N.Y. 436; *People* v. *Wood*, 391 Ill. 237.

Act, as a "body politic and corporate".[5] That section further provides:

> "The Authority is hereby constituted *a public instrumentality and the exercise by the Authority of the powers conferred by this act shall be deemed and held to be the performance of an essential governmental function*" (Italics supplied).

Section 17 of the Act exempted from taxation any project or property acquired or used by the Authority, together with its bonds and the income therefrom, because

> "[t]he exercise of the powers granted by this act will be in all respects *for the benefit of the people of the commonwealth,* for the increase of their commerce and prosperity, for the improvement of their health and living conditions, and as the operation and maintenance of the projects by the Authority will constitute the performance of *essential governmental functions*" (Italics supplied).

And Section 27 of the Act declared that the Act was "necessary for the welfare of the commonwealth and its inhabitants".

The governmental character of the Authority, which the General Court has thus expressed in unmistakable terms, was fully recognized in the *Opinion of the Justices,* 334 Mass. 721, as appears from the excerpt from that opinion set out in Appendix B of the Petition (Pet. 13a-15a). To

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[5] The phrase indicates a sovereign, or some division or entity thereof, exercising governmental functions. See, *e.g.*, *Munn* v. *Illinois*, 94 U.S. 113, 124; *In re Merriam's Estate*, 141 N.Y. 479, 483-484; *People* v. *Snyder*, 279 Ill. 435, 439-441; and *Ulrich* v. *Kolesan*, 132 Ohio St. 115, 118.

that excerpt should be added the following sentence (334 Mass. at 735), summarizing the Justices' view as to the nature of the Authority:

> "We regard the Authority as a purely public corporation for public purposes—*an arm of the State*—analogous to a municipal corporation" (Italics supplied).[6]

Petitioner's claim that the Authority's activities are neither directed nor supervised by the Commonwealth flies in the face of the express terms of the Enabling Act and of judicial decisions. "The authority is required to operate and maintain the airport (§ 5) and the other public 'projects' under its control, and it must enlarge and improve them (§§ 3[q], 8[c], as amended)." *Massachusetts Port Authority* v. *Clerk of East Boston District Court*, Mass. Adv. Sh. (1966) 171, 177, 214 N.E. 2d 23, 27. In carrying out that statutory obligation, the Authority possesses no "roving commission" to act as it pleases. See *Opinion of the Justices*, 330 Mass. 713, 725; *Appleton* v. *Massachusetts Parking Authority*, 340 Mass. 303, 310; *Gould* v. *Greylock Reservation Commission*, Mass. Adv.

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[6] The Supreme Judicial Court has repeatedly affirmed that authorities created under statutes substantially similar in language to the Enabling Act are governmental instrumentalities. See, *e.g.*, *City of New Bedford* v. *New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 329 Mass. 243, 248 ("an agency of government"); *City of New Bedford* v. *New Bedford, etc. Steamship Authority*, 336 Mass. 651, 656 ("a governmental instrumentality to accomplish a public undertaking"); *Massachusetts Turnpike Authority* v. *Commonwealth*, 347 Mass. 524, 529 (land held "in a governmental rather than in a proprietary capacity"); *Gardner* v. *Massachusetts Turnpike Authority*, 347 Mass. 552, 562 ("an agency of State government"); *Village on the Hill, Inc.* v. *Massachusetts Turnpike Authority*, 348 Mass. 107, 118 ("governmental in character" performing "its essential 'governmental function'"); *Massachusetts Bay Transportation Authority* v. *Boston Safe Deposit & Trust Co.*, 348 Mass. 538, 542 ("agency of the sovereign").

Sh. (1966) 431, 432, 215 N.E. 2d 114, 123. As was said in *Massachusetts Bay Transportation Authority* v. *Boston Safe Deposit & Trust Co.*, 348 Mass. 538, 545, 549:

> "The obligation to act reasonably in accordance with the statutory purpose and in a manner consistent with the public interest will be implied so far as not expressed. . . . If the Authority acts illegally, that is, in violation of the statute, officials or other persons having standing may act to invoke judicial review."

While the Authority is not "subject to the supervision or regulation of the Department of Public Works or any other department, commission, board, bureau or agency of the Commonwealth *except to the extent and in the manner provided by this act*" (§ 2) (italics supplied),[7] the Act provides for such supervision and regulation in many respects. The Authority is under both legislative and executive control. Thus, the Act contemplates that the Authority may be abolished and its functions and powers transferred to some other "board, body or commission" (§ 1(b)); and the Act itself is "freely revocable and amendable" by the legislature. *Opinion of the Justices*, 334 Mass. 721, 735, 738. Members of the Authority are appointed and subject to removal by the governor (§ 2). The Authority's rules and regulations shall not "conflict with the rules and regulations of any state or federal regulatory body having jurisdiction over the operation of aircraft" (§ 3(q)). Before taking private property by eminent domain the Authority "shall give security to the [State] treasurer, in such amount and such form as may be determined by the department of public works" (§ 3(k)). It

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[7] The italicized phrase is omitted in the quotation from the Act appearing on page 11 of the Petition.

may not sell properties acquired from the Commonwealth without the prior approval of the governor, and the proceeds of any such sale shall be paid to the treasurer of the Commonwealth (§ 4). Its power to order the removal or relocation of surface tracks, conduits, wires, poles or other property cannot be exercised with respect to facilities under the control of the Department of Public Works or the Metropolitan District Commission, or installed under licenses or permits granted by that Department or Commission, except with the approval of that Department or Commission (§ 4). It may not use land of the Commonwealth except with the prior approval of the governor and council (§ 4). It must appoint a financial advisor, whose appointment is subject to approval by the governor (§ 12). It must make an annual report of its activities both to the governor and to the legislature, setting forth "a complete operating and financial statement covering its operations during the year" (§ 21). Its employees are required to be members of the state retirement system (§ 22). It is required to pay amounts due for group insurance at such time and in such manner as the State Employees Group Insurance Commission may prescribe (§ 21). Employee grievances and disputes are subject to arbitration by the State Board of Arbitration and Conciliation, in the absence of arbitration agreements in collective bargaining agreements (§ 24). It is subject (§ 24) to the statutory provisions with respect to employment of persons in the construction of public works (G.L. c. 149, §§ 26, 27A-D), and with respect to competitive bidding on such construction (G.L. c. 149, §§ 44A-D). When all its capital obligations have been paid or provided for "all projects then under the control of the Authority shall be operated and maintained in such manner as may be provided by the general court" (§ 25). Being an agency of the state, its activities were subject to the general investigation by the Massachu-

setts Crime Commission. *Gardner* v. *Massachusetts Turnpike Authority*, 347 Mass. 552, 556, 562.

Since 1959, the Legislature has exercised its power to direct and control the Authority by imposing upon it new obligations and subjecting it to new restrictions. See, *e.g.*, St. 1960, c. 473 (requiring the installation of sound barriers at certain points at Logan and the designation of a so-called run up area for use during particular hours); St. 1961, c. 384 (providing for an annual audit of the Authority's books and accounts by the State Auditor); St. 1963, c. 410 and St. 1964, c. 383 (restricting the Authority's exercise of the power of eminent domain in certain areas adjacent to Logan and prohibiting certain uses of land within the boundaries of the airport which had been intended for the conduct of fixed base operations); and St. 1964, c. 730, § 1 (subjecting the Authority to the provisions of the so-called Open Meeting Law, G.L. c. 30A, § 11).[8]

That the Authority may sue and be sued in its own name in no way establishes that its action is not governmental. In *Parker* v. *Brown*, 317 U.S. 341 and other cases cited above, *supra* p. 5, fn. 2, in which official action of various officers, boards and agencies was held not subject to the Sherman Act, the officer, board or agency in question was suable, and, indeed, actually sued, in his or its own name. As the court below correctly pointed out (Pet. 7a), the issue is not one of immunity from suit, but whether the Sherman Act applies to the action in question. The issue is one of liability, not suability. Absence of liability does not rest

[8] For another example of legislative control of the operations of an Authority, see *City of New Bedford* v. *New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 336 Mass. 651, and *Opinion of the Justices*, 334 Mass. 765, upholding the validity of St. 1956, c. 747, which required the Steamship Authority to provide daily ferry service throughout the year, an obligation not imposed on it by the statute under which it was created (*City of New Bedford* v. *New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 330 Mass. 422).

on any "repeal of the antitrust laws by implication" (Pet. 11, 13). There "is nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature" (*Parker* v. *Brown*, 317 U.S. 341, 350).

The allegation in the amended complaint that "a conspiracy was entered into" between the Authority and Butler Aviation (R. 10-11) does not change the result. The conclusion that the defendants conspired in violation of the Sherman Act is expressly stated to be "Based on the foregoing statements" (R. 16), and the "foregoing statements" make it plain that the alleged "conspiracy" was nothing more than the Authority's own agreement with Butler Company that the latter should be the fixed base operator at Logan. No other "conspiracy" or "combination" is charged. All that is complained of is the arrangement whereby a public instrumentality, in the exercise of a governmental function, selected a person to perform essential tasks which that instrumentality was under a statutory duty to have carried on. The Authority did not become "a participant in *a private* agreement or combination *by others* for restraint of trade" (*Parker* v. *Brown*, 317 U.S. 341, 351-352) (Italics supplied).

The present case thus differs from *Harman* v. *Valley National Bank*, 339 F.2d 564 (9th Cir.), which petitioner mistakenly regards as in direct conflict with the decision below (Pet. 10). In the *Harman* case, neither the State nor any agency or representative thereof was a party defendant. The Court fully recognized that action by the State's Attorney General did not violate the Sherman Act, and that the conduct of the defendant banks in persuading him to take the action they desired was similarly lawful (339 F.2d at 566). But the complaint alleged that the joint effort of the defendant banks to influence the Attorney General "was but one element in a larger, long-continued

effort to restrain and monopolize 'commercial banking in particular and the financial industry in general within the State of Arizona'" (339 F.2d at 566) and that "the object of the general conspiracy was the unreasonable restraint and monopolization of the Arizona money market" (339 F.2d at 567). It was that preexisting, private conspiracy by the banks, which was plainly unlawful, in which the Attorney General allegedly participated and which the court regarded as actionable.

In holding that the Authority's arrangement to have a single fixed base operator at Logan, rather than two or more, was not illegal (Pet. Appendix A, 7a-8a) the court below applied well-settled principles. As the cases cited by the court demonstrate, the owner of a terminal may lawfully grant exclusive privileges with respect to the transportation of passengers or freight or the transaction of business or solicitation of customers thereon.[9]

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[9] In addition to the cases cited by the court below, see *Black & White Taxicab & Transfer Co.* v. *Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 527; *Delaware, Lackawanna and Western Railroad* v. *Morristown*, 276 U.S. 182, 194; *In Re Third Avenue Transit Corporation*, 233 F. 2d 310, 312 (2d Cir.); *Skaggs* v. *Kansas City Terminal Ry. Co.*, 233 Fed. 827 (W.D. Mo.); and cases collected in Annotation, 15 A.L.R. 356. The same principle is applicable to public airports (see, *e.g.*, *Harrison County Court* v. *West Virginia Air Service*, 132 W. Va. 1, 9 (fixed base operation); *Miami Beach Airline Service, Inc.* v. *Crandon*, 159 Fla. 504, 507-510; *Rocky Mountain Motor Co.* v. *Airport Transit Co.*, 124 Colo. 147, 158-159; *People ex rel Adamowski* v. *Daley*, 22 Ill. App. 2d 87, 92.

It is equally clear in the commercial field that an exclusive distributorship does not offend the antitrust laws. See, *e.g.*, *Ace Beer Distributors, Inc.* v. *Kohn, Inc.*, 318 F. 2d 283 (6th Cir.), *cert. den.* 375 U.S. 922, *rehearing denied*, 375 U.S. 982; *Schwing Motor Company* v. *Hudson Sales Corporation*, 138 F. Supp. 899 (D. Md.), *aff'd* 239 F. 2d 176 (4th Cir.), *cert. den.* 355 U.S. 823; *Packard Motor Car Company* v. *Webster Motor Car Company*, 243 F. 2d 418 (D.C. Cir.), *cert. den.*, 355 U.S. 830; *United States* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387, 398-399 (S.D.N.Y.) *aff'd* 321 U.S. 707, 719; *Savon Gas Stations Number Six, Inc.* v. *Shell Oil Company*, 309 F. 2d 306 (4th Cir.). *Cf. Susser* v. *Carvel Corporation*, 332 F. 2d 505, 516-517 (2d Cir.), *cert. dismissed*, 381 U.S. 125.

The cases of *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 and *Gamco, Inc.* v. *Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817, on which petitioner relies (Pet. 15), are not to the contrary. In *Poller*, it was claimed that Columbia Broadcasting, a competitor of plaintiff, conspired with third persons to eliminate plaintiff from the market in order to acquire his UHF station for itself at depressed prices and to destroy the entire UHF industry (368 U.S. at 469). Similarly in *Gamco*, the exclusion of plaintiff from the market was effected by its competitors, desirous of protecting their own local market, a classic Section 2 case of a monopolist exercising his power to exclude a business rival. There is no such claim here. The Authority was not in competition with Wiggins, nor engaged in business at all; it had no motive or purpose to acquire Wiggins' business or to restrain or monopolize fixed base operations at Logan or elsewhere. In selecting Butler rather than Wiggins to furnish vital fixed base services, it neither sought nor gained anything for itself.

The decision below in no way conflicts with Section 308(a) of the Federal Aviation Act or the 1965 Policy Statement of the Federal Aviation Agency, to which petitioner refers (Pet. 8-9, 10, 11). Neither that Act nor the Policy Statement purports to make exclusive arrangements illegal; they merely establish a condition on the expenditure of Federal funds. If Congress had intended to make the grant of exclusive rights an offense, it would scarcely have limited that offense to arrangements at federally-supported airports. Indeed, the Act implicitly recognizes that exclusive arrangements do not in themselves violate the law. For if a grant of exclusive rights were unlawful as a violation of the anti-trust laws, there would have been no occasion for a specific provision against giving Federal

funds to an airport where such an illegal arrangement existed.

The Policy Statement itself (30 F.R. 13661) indicates that the present situation at Logan Airport complies with the requirements of the Act. The lease to Butler-Boston was entered into in September, 1961 (R. 14). In July 1962, the Federal Aviation Agency first issued a Policy Statement with respect to Exclusive Rights on Airports Receiving Federal Funds. 27 F.R. 7054. In that Statement it discussed the situation at Logan Airport, of which petitioner complains in this case,[10] and stated that "the Adminstrator accepted the offer by the airport to enter into arrangements with at least one more fixed-base operator, which arrangements were subsequently negotiated successfully" (27 F.R. 7054). Under those arrangements, as the Complaint shows, the Authority extended Van Dusen's lease and Van Dusen has continued as a fixed-base operator at Logan (Pet. 6; R. 14, 15-16). Thus, an exclusive fixed-base operation at Logan never was, and is not now, in effect. Moreover, the Agency's 1965 Policy Statement (30 F.R. 13662) makes it clear that prior to the publication of its July 17, 1962 Statement "exclusive rights to conduct certain activities not involving the actual use of public landing areas were not considered to be in violation of the statute"; and it declares that the existence of an exclusive agreement made prior to that date (as was the lease to Butler-Boston) does not preclude the continued expenditure of Federal funds, provided the agreement is terminated at the earliest renewal or cancellation date.

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[10] The Policy Statement does not mention Logan Airport by name but refers to "Case A" which "involved a large Eastern airport". A comparison of the Agency's description with the allegations of the petitioner's amended complaint in this action makes it manifest that the both are dealing with the same situation.

Conclusion

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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